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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. BOBBY RAY GRANT, Defendant and Appellant.	C061320 (Super. Ct. No. 08F01588)

Defendant Bobby Ray Grant appeals his convictions by jury for rape, being a felon in possession of ammunition, and making a criminal threat. He contends the trial court erred in denying his motion to suppress evidence, erred in excluding evidence that charges related to prior sexual misconduct were dismissed and erred in imposing a concurrent term for the rape and criminal threats convictions. The People concede the final point. We find the court erred in denying defendant's motion to suppress and in imposing concurrent terms on the rape and criminal threats convictions. We find no prejudicial error in the exclusion of evidence of dismissal.

FACTUAL BACKGROUND

In September 2007, K.C. was 15 years old. Not getting along with her parents, she moved out of their home and moved in with her grandparents. A few months later, she moved out of her grandparents' home and eventually ended up staying with her friend Melissa. There, she met defendant and Raul Garcia.[1] K.C. and Garcia immediately became romantically involved and she moved into his apartment on Norcade Circle. She stayed with Garcia in his bedroom. About a week later, defendant started staying at the apartment. K.C. lived at the apartment for about three weeks. She considered Garcia her boyfriend and had consensual sex with him about five times. During this time, K.C. also used various drugs, including cocaine, methamphetamine and marijuana.

On February 26, 2008, K.C. and Garcia argued. K.C. told Garcia and defendant she did not want to stay with them anymore and wanted to leave. Defendant appeared angry. He asked whether they were supposed to let her stay at the apartment for free, without giving him and Garcia anything in return. K.C. offered them money, but they refused it. By the end of the argument, K.C. assured them she was not going to leave. She walked down the street with a friend to a neighbor's house.

K.C. later returned to the apartment and went into Garcia's bedroom to pack her things. Garcia followed her into the room

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[1] Garcia was a co-defendant in the case.

and insisted she was not leaving. Garcia left the room and defendant entered. He told K.C. she could not leave and instructed her to take off her clothes. She told him she did not want to and he threatened to "blow [her] noodles out if [she] didn't have sex" with him.

K.C. complied and took off her clothes. Defendant ordered her to orally copulate him and she did. Defendant then raped K.C.

As K.C. began to get dressed, Garcia came in the room and told her not to put her clothes back on. She told him she did not want to, but she was afraid and complied with his orders. Garcia then raped K.C. Despite K.C. telling Garcia he was hurting her, he did not stop. He then grabbed her by the hair and forced her to orally copulate him. Garcia ejaculated in her mouth and she spit out the semen on a blanket. As K.C. was again putting on her clothes, Garcia threatened to kill her if she tried to leave.

K.C. was frightened. She had seen Garcia with a shotgun numerous times before, and had overheard defendant threatening to kill people with the shotgun. She also had seen a shoe box of ammunition in defendant's closet. The shotgun was kept in defendant's bedroom closet. After the assaults, K.C. tried to act like "everything was okay." She went to get something to drink, then went back into Garcia's bedroom and fell asleep lying between defendant and Garcia. The next morning, K.C. showered and changed clothes. Garcia and defendant talked about making a drug deal and left the apartment. They took the

shotgun to a friend's house. After Garcia and defendant left, K.C. packed some of her things and went to her friend's home. She spent the day at her friend's. She smoked some marijuana and called her mother and her cousin Starla. Over the course of numerous phone calls, K.C. gave varying accounts to Starla and Starla repeatedly told K.C. to leave the house. When K.C. finally told Starla she had been raped while the perpetrators held a shotgun to her head, Starla called 911.

Police officers responded to Starla's call and arrived at Norcade Circle at around 7:20 p.m. K.C. was still at her neighbor's home and was very afraid. She was placed in a patrol car and interviewed. She told officers that defendant was staying with Garcia in Garcia's apartment, and that she thought defendant might be currently in the apartment. K.C. then saw Garcia walking down the street and identified him to officers. Garcia was arrested.

At the scene, officers determined Garcia was on searchable probation. After getting the keys to the apartment, officers conducted a protective sweep of the apartment because they were concerned defendant, an armed suspect, might be inside. There was no one in the apartment. Crime scene investigators entered the apartment and began processing evidence. Officers later searched the apartment, pursuant to the terms of Garcia's probation.

The search began in the upstairs southeast bedroom. There was no bedding or blankets in the room. In a closet on the shelf, officers found a shoe box with ammunition in it, a candle

with two rounds of ammunition and plastic baggies of the sort used as packaging materials for narcotics. There was also a pair of jeans on the bed with defendant's identification in the pocket.

In an upstairs hallway closet, officers found 15 prepackaged bags of marijuana. There were similar bags found in the kitchen cupboards.

In the second bedroom, documents with Garcia's name were found in the closet. No contraband was found in that room.

K.C. was taken to U.C. Davis for a medical examination. The forensic nurse practitioner examined K.C. and collected samples. K.C. reported her neck, back and legs hurt and she had pain when walking or urinating. She identified her assailants as Garcia, age 20, and a man named "Bob," age 34. She told the examining nurse that defendant and Garcia had threatened to kill her because she knew too much about their drugs and guns. K.C. reported both defendant and Garcia had penetrated her and forced her to orally copulate them, they both kissed and licked her, ejaculated in her vagina and Garcia also ejaculated in her mouth and on a blanket. K.C. had multiple bruises on her arms and thigh, an abrasion on her labia majoria, her fossa was very red and tender and she had a cervix which bled easily.

K.C.'s urine sample tested positive for a metabolite of cocaine, a metabolite of cannabis, amphetamine and methamphetamine. K.C. had snorted powder cocaine before the rapes and smoked marijuana after the rapes. She had also used methamphetamine about a week before the rapes. A couple of days

before the rapes, K.C. had taken cocaine and been up for about two or three days without sleep.

DNA samples were taken from K.C.'s vagina and underpants. Defendant could not be excluded as a contributor to the sperm on the vaginal swabs, and he was a major contributor of the sperm on her underpants. A penile swab was taken from Garcia which produced two sperm fractions, one from Garcia and one from defendant.

Evidence of a prior uncharged sexual offense from 1999 was also admitted. S.B. testified that when she was 18 years old, and transitioning out of foster care, she was placed in a program at a youth center. She, her roommate A.M., and two men, including defendant, were spending time together at the apartment. S.B. went into her bedroom, changed clothes and got into bed. Defendant came into the room and she asked him to leave. Later, he returned, got undressed and got into bed behind her. He then raped her. When police began investigating the rape, defendant came by the apartment and told A.M. he would "take care of" S.B. if she called the police.

A.M. testified that S.B. had been massaging defendant for about 20 minutes and they went into her bedroom together. Defendant came out about 30 minutes later. A.M. did not recall defendant threatening to harm S.B. if she spoke to the police.

During deliberations, the jury asked whether defendant had been convicted of raping S.B. In response, the court directed the jury to reconsider the jury instruction on this point, CALCRIM No. 1191, that evidence of an uncharged sexual offense

could be considered only if the People had proven he committed the act by a preponderance of the evidence.

PROCEDURAL BACKGROUND

Defendant was charged with two counts of forcible oral copulation in concert with Garcia (Pen. Code, § 288a, subd. (d), counts 1 and 4),[2] two counts of rape in concert with Garcia (§ 264.1, counts 2 and 3), one count of making criminal threats (§ 422, count 7), and one count of being a felon in possession of ammunition (§ 12316, subd. (b)(1), count 8). It was also alleged defendant had suffered a prior serious felony conviction and served a prior prison term.

Defendant and Garcia were tried jointly. Defendant was acquitted as to the oral copulation in concert counts and one of the rape in concert charges. He was found guilty of rape, as a lesser included offense of rape in concert, making a criminal threat and being a felon in possession of ammunition. The jury deadlocked on forcible oral copulation as a lesser included offense to the two oral copulation in concert charges and deadlocked on the second rape charge.

Defendant was sentenced to an aggregate term of 24 years and eight months in prison. The term consisted of the upper term of eight years on the rape conviction, doubled to 16 years, pursuant to the Three Strikes law, the midterm of one year and four months on the making a criminal threat conviction, to be

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[2] Undesignated statutory references are to the Penal Code.

served concurrently, one year and four months (one-third the midterm) on the being a felon in possession of ammunition conviction, to be served consecutively, plus five years for the prior serious felony and one year for the prior prison term.

DISCUSSION

I

Defendant contends the trial court erred in finding the doctrine of inevitable discovery "vitiated the illegality of the search and seizure," and therefore erred in denying his motion to suppress the evidence obtained in searching his room in Garcia's home. Accordingly, he contends his conviction for being a felon in possession of ammunition must be reversed. The People do not address defendant's argument regarding the applicability of the inevitable discovery doctrine. Instead, the People argue the trial court properly denied the motion to suppress because the search of defendant's bedroom fell within the scope of Garcia's probation search, a claim rejected by the trial court. We disagree with the People and agree with defendant.

"The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362; see *People v. Weaver* (2001) 26 Cal.4th 876, 924.) "But while we

defer to the superior court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of a search on the facts so found. [Citations.]" (*People v. Woods* (1999) 21 Cal.4th 668, 673-674.) Where the search is conducted without a warrant, the burden is on the People to establish by a preponderance of the evidence justification under a recognized exception to the warrant requirement. (*People v. James* (1977) 19 Cal.3d 99, 106.)

Background

Defendant filed a motion to suppress under section 1538.5, arguing that the warrantless search of his room was unlawful because, as an overnight guest in Garcia's apartment, he had a reasonable expectation of privacy in his bedroom. Accordingly, he contended the ammunition found in his bedroom should have been excluded. The People argued Garcia's searchable probation status extended to defendant's bedroom and that the "nature of the investigation would have led to the inevitable discovery of [defendant's] identity and his searchable probation status."

Officer Stafford interviewed K.C. before Garcia's arrest. She told him she had been staying at the apartment with Garcia and defendant. She also said the home belonged to Garcia and defendant. K.C. told him she was staying in the bedroom with Garcia. She told him she was raped in Garcia's bedroom and after one of the forced oral copulations, she spit the semen out on a blanket in the bedroom. When the officers searched the home, it was apparent someone was "staying" in defendant's

bedroom. There was clothing on the floor, the bed and in the closet. There was not any bedding or blankets on the bed. There was a sign on the door to defendant's bedroom that said, "Do not enter without permission."

The trial court found defendant was an overnight guest at Garcia's home, and as such had a legitimate expectation of privacy in the bedroom. The court also found that defendant did not lose his expectation of privacy in the bedroom because Garcia was on searchable probation and implicitly found there was no evidence that Garcia had joint access and control of the bedroom. However, the court denied the motion to suppress, based on the doctrine of inevitable discovery. The court found once officers discovered defendant's last name, they would have also determined he was on searchable probation and could have lawfully searched the room at that time, thereby discovering the box of ammunition.

Garcia's Probation Search

The People argue the motion to suppress was properly denied, as the search of defendant's bedroom was included within the scope of Garcia's probation search. They contend the officers had a reasonable belief that Garcia had complete or joint control over defendant's bedroom, thus, the search fell within the scope of Garcia's probation search conditions. In so arguing, the People rely solely on the information available to Deputy Harris at the time of the search. That is, that the officer knew that Garcia was on probation and there was another suspect, "Bob." Harris had no information about whether Bob

lived at the apartment or which bedroom was Garcia's. The People mistakenly fail to consider Officer Stafford's knowledge at the time of the search and whether that knowledge should be imputed to the searching officers under a theory of collective knowledge.

It is well established that a law enforcement officer may arrest a person based on information furnished by other law enforcement officers as long as the collective knowledge of the officers provides probable cause for the arrest. (*Remers v. Superior Court* (1970) 2 Cal.3d 659, 666-667; *People v. Ramirez* (1997) 59 Cal.App.4th 1548, 1553; *People v. Alcorn* (1993) 15 Cal.App.4th 652, 655.) Although the arresting officer's reliance on the information provided by the other officers must be reasonable, the arresting officer does not need to know the nature or extent of the probable cause. (*People v. Ramirez, supra*, 59 Cal.App.4th at pp. 1554-1555.) "[T]he important question is not what each officer knew about probable cause, but how valid and reasonable the probable cause was that developed in the officers' collective knowledge." (*Id*. at p. 1555.) Consequently, courts look at the total law enforcement activity to determine the constitutionality of the arrest. (*People v. Alcorn, supra*, 15 Cal.App.4th at p. 656.)

It is similarly well-established that "'[L]aw enforcement officials are collectively responsible for keeping ["'official'"] channels free of outdated, incomplete, and inaccurate warrant information. . . . [¶] . . . The test, under these circumstances, is not merely the good faith of the

individual officer in the field, but the good faith of law enforcement agencies of which he is a part.' [Citation.] When '"the police . . . are at fault in permitting the records to remain uncorrected,"' they '"may not rely upon incorrect or incomplete information . . . ."' [Citation.]' [Citation.]" (*People v. Willis* (2002) 28 Cal.4th 22, 46.) Thus, exclusion is required when "the arrest that led to the search was 'made on the basis of data [that] a law enforcement agency knew or should have known were in error because of inadequate or negligent record-keeping.' [Citation.]" (*Ibid.*)

Although the specific factual backgrounds in the above cases are different, we believe the reasoning underlying those cases leads to the conclusion that in determining the reasonableness of a search or seizure, we look to the entirety of the knowledge of law enforcement at the time of the search; that is, the collective knowledge. Here, the collective knowledge before the search included the information provided by K.C. to Officer Stafford. Thus, in analyzing the propriety of the search of defendant's room, that information must also be considered.

Probation conditions may validly authorize warrantless searches of the probationer's home, person, and effects. (*People v. Woods, supra*, 21 Cal.4th at pp. 674-675.) Such a search may extend to areas over which the probationer shares common authority with nonprobationers, based on the rationale that persons with joint access to and general control over an area assume the risk that any one of them may consent to its

being searched by the police. (*People v. Woods, supra*, 21 Cal.4th at pp. 675-676; *People v. Smith* (2002) 95 Cal.App.4th 912, 916; *United States v. Matlock* (1974) 415 U.S. 164, 171 & fn. 7.)

On the other hand, officers carrying out a probation search "generally may only search those portions of the residence they reasonably believe the probationer has complete or joint control over." (*People v. Woods, supra*, 21 Cal.4th at p. 682.) In a home shared by a probationer and other people, for example, the common areas may all be searched, but only the probationer's bedroom, and not those used exclusively by the probationer's cohabitants. (See *People v. Smith, supra*, 95 Cal.App.4th at pp. 916-917; *People v. Robles* (2000) 23 Cal.4th 789, 798.)

Here, the court found defendant was an overnight guest with a reasonable expectation of privacy in the bedroom. This finding is unchallenged. Thus, for the search of his bedroom to be lawful, officers must have reasonably believed Garcia had complete control or joint access to the room. In ruling that Garcia's probationary status did not give the officers authority to enter defendant's room, the trial court noted the distinction between the status of defendant's bedroom and the common areas in the house. In so doing, the court implicitly found that officers did not have a reasonable belief that Garcia had joint control over defendant's bedroom.

There is substantial evidence supporting this decision. The officers knew that the probationer had a roommate, "Bob." They knew K.C. had been staying in Garcia's room and her clothes

were in that room. They knew that K.C. had been raped in Garcia's room. They also knew there was a blue blanket on the bed in Garcia's room. When they went upstairs, there was only one bedroom with a blanket on the bed. There was no bedding at all in defendant's bedroom. There was also a sign on the door which said, "Do Not Enter without Permission." Based on this record, the People did not meet their burden to establish Garcia had joint access or control over the bedroom. Accordingly, there was sufficient evidence to support the trial court's finding that the officers did not reasonably believe Garcia had joint access and control over defendant's bedroom.

Inevitable Discovery

Defendant contends the trial court erred in denying his motion to suppress by finding that the ammunition in his bedroom would have inevitably been discovered. We agree.

"The inevitable discovery doctrine operates as an exception to the exclusionary rule: Seized evidence is admissible in instances in which it would have been discovered by the police through lawful means. As the United States Supreme Court has explained, the doctrine 'is in reality an extrapolation from the independent source doctrine: Since the tainted evidence would be admissible if in fact discovered through an independent source, it should be admissible if it inevitably would have been discovered.' [Citations.] 'The purpose of the inevitable discovery rule is to prevent the setting aside of convictions that would have been obtained without police misconduct.'

[Citations.]" (*People v. Superior Court (Walker)* (2006) 143 Cal.App.4th 1183, 1214-1215.)

"[T]o justify application of the inevitable discovery exception, [the People] must demonstrate by a preponderance of the evidence that, due to a separate line of investigation, application of routine police procedures, or some other circumstance," the evidence seized from the room, the ammunition, "would have been discovered by lawful means. The showing must be based not on speculation but on 'demonstrated historical facts capable of ready verification or impeachment.' [Citation.] The inevitable discovery exception requires the court '"to determine, viewing affairs as they existed at the instant before the unlawful search, what *would have happened* had the unlawful search never occurred."' [Citation.]" (*People v. Hughston* (2008) 168 Cal.App.4th 1062, 1072, emphasis in original.)

Here, the court found the inevitable discovery doctrine applied to this case: "It's also clear that Defendant Grant is on probation and with search conditions; therefore, [defendant] knew that he could be searched anytime, anywhere, his person and wherever he resided, so the premises under which he resided could -- and kept property could eventually be searched. [¶] His probation status, once they found out [defendant's] last name and got that information, would eventually have been discovered; therefore, his room where he stayed could have been lawfully searched at that time, the box and the ammunition would have been discovered at that time. [¶] So I believe the one

issue that the People can hang their hat on is the doctrine of inevitable discovery that the fact that [defendant's] property, including the ammunition, would have eventually been discovered based on the fact that it's pretty clear he stayed there, he was an overnight guest, that was a room that he used, because he used that room, he had his property in that room, the search could have been conducted in that room, and based on that issue alone, I'm going to deny the motion to suppress."

Here, it is clear that officers would have discovered defendant's identity through lawful means and the application of routine procedures. Defendant had provided a DNA sample to law enforcement as early as 1993. There was DNA evidence taken from K.C. Eventually, this evidence would have been matched and led to defendant's identity. In addition, Garcia was in custody and knew defendant's identity and the neighbors were clearly aware of defendant's identity. In the course of their normal investigation, it is reasonably probable defendant's identity would have been discovered.

However, the inevitable discovery of defendant's identity is not the same as inevitable discovery of the ammunition found in his room. "A number of courts have recognized that the possibility someone would have removed or destroyed the evidence at issue undermines a showing of inevitability. (See *People v. Bennett* (1998) 17 Cal.4th 373, 392, fn. 7 . . . ['[w]e do not know of any decision holding that the prosecution may resort to the inevitable discovery doctrine to prevent suppression of illegally seized evidence when, as here, a defendant could have

caused the removal or destruction of the evidence']; . . . *U.S. v. Boatwright, supra*, 822 F.2d at p. 865 [the defendant 'would not have waited patiently beside his weapons for an agent to arrive with a warrant']; . . . *United States v. Owens* (10th Cir. 1986) 782 F.2d 146, 153 [the defendant or a friend might have moved the contraband]; cf. *People v. Hoag* (2000) 83 Cal.App.4th 1198, 1217 . . . (conc. opn. of Morrison, J.) [noting the evidence showed the occupant of the house 'was not poised to destroy the evidence'].)" (*People v. Hughston, supra,* 168 Cal.App.4th at p. 1073.)

The record here does not support the conclusion that the ammunition would have inevitably been discovered by the officers. There is no evidence of how long it might have taken for the police to independently discover defendant's identity and his probation status and what, if any, measures would have been taken in the interim to secure the location and prevent the evidence from being removed. There was, however, evidence that defendant was aware that the search was occurring, and in fact was watching it from down the street. Furthermore, defendant was in the home shortly after the officers finished the search and was removing his belongings. The possibility that the evidence would have been removed before law enforcement was able to lawfully search defendant's room undermines the showing of inevitability.

Because the court erred in applying the inevitable discovery doctrine to this case, the evidence procured as a result of the unlawful search should have been suppressed. In

this case, that evidence was the ammunition found in defendant's room. This evidence was part of the evidentiary basis for his conviction on count 8, being a felon in possession of ammunition. Accordingly, the conviction on count 8 must be reversed.

II

Defendant next contends the trial court erred in excluding evidence that the charges related to his prior sexual misconduct case were dismissed. Evidence was admitted regarding a 1999 alleged rape of S.B. The charges were dismissed by the prosecution in February 2000. Defense counsel moved in limine to allow evidence of that dismissal to be admitted into evidence. The file for the 1999 case had been destroyed, so it was unclear why the charges had been dismissed. The court denied the motion, noting there are many reasons cases get dismissed and that uncertainty would lead to too much speculation.

Discussion

Defendant relies on *People v. Mullens* (2004) 119 Cal.App.4th 648 and *People v. Griffin* (1967) 66 Cal.2d 459, to support his claim that the evidence of the charges related to S.B. were dismissed should have been admitted. He contends although *Mullens* and *Griffin* deal with cases in which the defendant was acquitted of the charges, a dismissal is similar to an acquittal in that it does not necessarily mean defendant did not commit the offense, only that the prosecution could not prove it beyond a reasonable doubt. The People contend the fact

of a dismissal alone is not a relevant fact having any tendency to prove or disprove any disputed fact in the case.

Assuming without deciding that defendant is correct and the trial court erred in excluding this evidence, we find any such error harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) In this case, K.C. testified as to defendant's rape of her. She was visibly frightened when speaking to the police. A physical examination the next day revealed multiple bruises on her arms and thigh. Areas of her genitals were abraded, red and tender. DNA samples taken from K.C.'s vagina and underpants were consistent with defendant. A penile swab taken from Garcia also produced evidence of defendant's sperm. In addition, the jury saw the victim of that offense testify and could judge her credibility for themselves. On this record, it is not reasonably probable that evidence of the dismissal of the charges related to S.B. would have led to an acquittal on the charges related to K.C..

III

Defendant next contends pursuant to section 654, the sentence for count 7, making criminal threats, should be stayed as it was part of the same course of conduct as count 2, the rape. The People properly concede this point and we accept the concession.

DISPOSITION

The conviction on count 8, being a felon in possession of ammunition, is reversed. The sentence on count 7, making a criminal threat, is stayed. In all other respects, the judgment

is affirmed. The superior court is directed to issue an amended abstract of judgment reflecting the reversal of count 8 and the sentence thereon, and to forward a certified copy of the same to the Department of Corrections and Rehabilitation.

SIMS, Acting P. J.

We concur:

RAYE, J.

CANTIL-SAKAUYE, J.